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JURISDICTIONAL STATEMENT

Appellant incorporates the Jurisdictional Statement from page 13 of his Opening Brief.

STATEMENT OF FACTS

Appellant incorporates the Statement of Facts from pages 14-32 of his Opening Brief.

POINT I[1]

The trial court abused its discretion in rejecting the jury's initial verdict of life imprisonment, or in the alternative, failing to conduct an inquiry to determine the reason that the jury returned its verdict of life imprisonment and the point at which the jurors lacked unanimity, because the court's actions denied Kenny the right to a fair trial, due process, freedom from double jeopardy, freedom from cruel and unusual punishment, and to be sentenced by a jury of his peers, U.S.Const. Amends.V,VI,VIII,XIV, Mo.Const., Art. I, §§10,18(a),19,21, and §565.030, in that (1) the jurors returned a proper verdict of life imprisonment; (2) due to its own lack of understanding, the court rejected the verdict and sent the jurors to deliberate further without providing further instruction to the jury; and (3) the court's actions led the jurors to believe that their first verdict must be improper, thereby effectively coercing them to return a "deadlocked verdict" because that was the only possible verdict in light of the court's actions.

Woodson v. North Carolina, 96 S.Ct. 2978 (1976);

State v. Peters, 855 S.W.2d 345 (Mo.1993);

[1] Kenny maintains each of the twelve points presented in his Opening Brief. Only those points to which he finds it necessary to reply are contained herein. The remaining points are incorporated by reference.

State v. Lashley, 667 S.W.2d 712 (Mo.1984);

State v. Apodaca, 940 P.2d 478 (N.M. App. 1997);

U.S.Const. Amends.V,VI,VIII,XIV;

Mo.Const., Art. I, §§10,18(a),19,21;

§§558.016, 565.030, RSMo;

Mo.Sup.Ct.R. 30.20; and

MAI Cr3d 300.03, 312.10, 313.41A.

POINT II

The trial court abused its discretion in admitting State's Ex.89 as evidence that the Circuit Court of Pettis County had issued an order of protection to Kenny's ex-wife against Kenny. The exhibit was not relevant and the State cannot use the excuse that it acted in good faith in offering the exhibit when its relevance hinged on later questionable testimony, especially since the State affirmatively misled the judge and jury as to the true nature of the Circuit Court's proceedings. Kenny was prejudiced, because the sentencer was improperly led to believe that a court had held a hearing and made a finding that Kenny had committed violence or misconduct against his ex-wife sufficient to warrant an order of protection.

POINT III

The trial court abused its discretion in letting the State present testimony through Prine and VanStraten that Arlene Menning moved either during or after the assault, because VanStraten's testimony was merely a subset of Prine's and allowed the State to gain an unfair advantage over the defense by presenting the same testimony and gory photographs twice, causing reversible error.

State v. Seever, 733 S.W.2d 438 (Mo.1987); and

State v. Cole, 867 S.W.2d 685 (Mo.App.1993).

POINT VI

The trial court abused its discretion in allowing the State to elicit from Sheriff Spencer, over defense counsel's objection, that Kenny jimmied the locks to get out of the cell. The State's argument creates a new and improper exception to Miranda. The defense did not open the door to the inadmissible testimony, nor was the testimony proper under the "rule of completeness" since the defense did not elicit any part of Kenny's statement to Spencer. The testimony prejudiced Kenny because it supported the State's argument that Kenny was a great risk to escape again if he were sentenced to life imprisonment.

Miranda v. Arizona, 86 S.Ct.1602 (1966).

POINT VII

The trial court abused its discretion during closing in overruling Kenny's objection to the State's comment that Kenny was merely "building a case" by presenting evidence that he was voted as the laundry worker of the month, and plainly erred in letting the State make comments that set the jury forth as the voice of the victims; misstated the goal of a capital sentencing as solely to obtain justice for the victims; urged the jury to ignore mitigating evidence; and compared the rights of the victims to Kenny's rights at the sentencing trial. Kenny complied with Rule 84.04(d) when he included several claims of closing argument error in one point, because this Court routinely assesses claims of closing argument error in conjunction with each other. Kenny also satisfactorily cited to specific instances of the State's improper comments. The State improperly personalized by begging the jurors to abdicate their role as impartial arbiter of the facts and to use emotion rather than reason, by speaking for the victims.

Gardner v. Florida, 97 S.Ct. 1197 (1977);

State v. Storey, 901 S.W.2d 886 (Mo.1995);

State v. Taylor, 944 S.W.2d 925 (Mo.1997);

Hall v. State, 16 S.W.3d 582 (Mo.2000); and

Mo.Sup.Ct.R. 84.03, 84.04.

POINT XII

Kenny's death sentences are disproportionate under §565.035. Upholding the sentences would violate Kenny's rights to due process and to be free from cruel and unusual punishment. U.S.Const., Amends.V,VIII,XIV; Mo.Const., Art.I, §§10, 21. Kenny's sentences were the result of many arbitrary factors and of passion and prejudice. The sentences of death are disproportionate to the penalty imposed in similar cases.

U.S.Const., Amends.V,VIII,XIV;

Mo.Const., Art.I, §§10, 21; and

§565.035, RSMo.

ARGUMENT I

The trial court abused its discretion in rejecting the jury's initial verdict of life imprisonment, or in the alternative, failing to conduct an inquiry to determine the reason that the jury returned its verdict of life imprisonment and the point at which the jurors lacked unanimity, because the court's actions denied Kenny the right to a fair trial, due process, freedom from double jeopardy, freedom from cruel and unusual punishment, and to be sentenced by a jury of his peers, U.S.Const. Amends.V,VI,VIII,XIV, Mo.Const., Art. I, §§10,18(a),19,21, and §565.030, in that (1) the jurors returned a proper verdict of life imprisonment; (2) due to its own lack of understanding, the court rejected the verdict and sent the jurors to deliberate further without providing further instruction to the jury; and (3) the court's actions led the jurors to believe that their first verdict must be improper, thereby effectively coercing them to return a "deadlocked verdict" because that was the only possible verdict in light of the court's actions.

The most troubling aspect of the State's response is that the State has no qualms about the prospect of sending a man to the death chamber despite the jury's initial assessment of sentences of life without parole. An appeal, like a trial, must work to ferret out and advance the truth rather than rubberstamp what occurred at the circuit court level. "The American jury trial is a search for truth, not a ceremony to confirm official truth." State v. Wolfe, 13 S.W.3d 248, 276

(Mo.2000) (Wolff, J, dissenting). Through its argument, the State sites legal dogmas to confirm the "official" truth while refusing to acknowledge or consider anything which may shed light on the actual truth--that the jurors properly assessed life sentences despite an apparent lack of unanimity caused by an ambiguous polling question.

The State's argument all flows from the concept that every single verdict must be unanimous; without unanimity, there cannot be a verdict (Resp.26-30, 36-37). Although this would be indisputable in a guilt phase proceeding, it is not applicable to the unique context of a capital sentencing trial. By ignoring the unique context of a capital sentencing trial, as set forth in §565.030.4, the State's response misses the mark.

§565.030.4(2) provides that the jury can assess a sentence of life imprisonment despite a lack of unanimity. In fact, the jury must assess a sentence of life imprisonment if even one juror finds that the aggravating factors do not warrant death. *See* MAI-CR3d 300.03, 313.41A; State v. Ramsey, 864 S.W.2d 320, 337 (Mo.1993); State v. Whitfield, 837 S.W.2d 503, 515 (Mo.1992).

True, the case would have been without question if all twelve jurors had agreed that the verdicts were theirs. Then, there could be no question about unanimity, and the situation would have fit within the State's norm.

But there is no evidence to support the State's assumption that the jurors understood what was being asked of them when each was asked "Is this your verdict?" At that point, the foreperson had already provided the judge with the

jury's assessment of sentence--life imprisonment--and the court had announced that assessment (Tr.1066-67). When each juror was asked individually, "Is this your verdict?", the jurors must have believed that they were being asked if they each personally agreed with that outcome, *i.e*., is this the verdict that you personally wanted, or was this your vote? Eleven of the jurors answered "no" because those eleven would have wanted a different outcome. But regardless of what each juror personally wanted, the assessment of life sentences was proper given the jury's inability to agree as a unit that the aggravators warranted death.

For the State's interpretation of the polling to be correct, the jurors would have had to understand that they were being asked whether each of them agreed that the announced assessment of sentences was the verdict that the jury as a unit had reached after reading the instructions and deliberating on the evidence. No evidence suggests that the jurors understood that the court was asking each juror whether the sentence assessments reflected the wishes of the jury as one unit, versus that juror's individual vote. Rather, the record shows otherwise.[2]

And under the State's argument, one juror must have coerced eleven others to assess sentences of life imprisonment. No evidence supports this argument.

The State's argument is premised upon non-death cases, where §565.030 is inapplicable. The State relies on just one capital case--State v. Lashley, 667 S.W.2d 712 (Mo.1984)--and even that case did not deal with the unanimity requirement. Instead, it concerned whether the court was correct to send the jury

to deliberate further after the jury had returned a verdict that was facially invalid. *Id*., at 715. This Court held that because the judge had advised the jury that the verdict was not in proper form and requested that the jury retire and read the instructions, the court had handled the manner in a neutral and proper fashion. *Id*. In contrast, here the trial court was not faced with facially invalid verdicts, and by rejecting the verdicts without providing any instruction to the jury, the judge left the jury believing it had no option but to return deadlocked verdicts.

None of the cases cited by the State involve a verdict that can be interpreted as valid under a legitimate reading of the law and instructions despite seemingly ambiguous polling results, as in this case.

Of course, trial judges should resolve true ambiguities in verdicts. The State's cases urge trial judges to allow the jurors to resolve these ambiguities. State v. Peters, 855 S.W.2d 345 (Mo.1993); State v. Zimmerman, 941 S.W.2d 821 (Mo.App.1997); State v. Apodaca, 940 P.2d 478 (N.M. App. 1997). And in those cases, the most logical way to do so was to send the jury back to deliberate further. But those cases do not absolutely mandate further deliberation as the only means to resolve the ambiguity. The goal is to resolve the ambiguity. Where, as here, further deliberation would not resolve the ambiguity--it would harden it--the judge should seek another means to resolve the ambiguity.

We must not lose sight of the forest for the trees. "The critical issue, of course, is whether defendant has in fact been acquitted by a jury." Peters, 855

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[2] *See* affidavit of George Meyer (L.F.351-52).

S.W.2d at 349. To resolve this essential question, "it may be necessary to ask the jury which aspect of the verdict is correct… If the verdict is ambiguous, the best way to clarify the message is to ask the sender of the message (the jury) what was meant." *Id*., at 348. Trial judges should "make every effort to salvage an improper verdict by calling the jurors' attention to their mistake in failing to follow the jury instructions and giving them an opportunity to correct the mistake." *Id*.

In Zimmerman, 941 S.W.2d at 825, the Western District warned that the court should not try to ascertain "the intent of the jury as to its verdicts based upon inferences, conjecture and speculation." While it supported further deliberations in such an instance, it also recognized that tailored polling questions could be employed to resolve the ambiguity:

> Here, because there were two returned inconsistent verdicts as to Count I, the trial court could not simply ask if Verdict Form B was the jury's verdict; it would have to ask which verdict was its verdict as to Count I. The trial court, being unaware of the inconsistent verdicts, did not directly address both verdicts with the jury foreperson or the jurors. Thus, there was no opportunity for each juror to tell the court whether he or she agreed with the verdict in Verdict Form B or Verdict Form G. We are confident that had the trial court asked the jury which Count I verdict was its true verdict, the confusion could have been cleared up.

Id., 825-26. Thus, even the cases relied upon by the State allow the trial court discretion to utilize polling questions tailored to the unique situation presented. The trial court need not be limited merely to "Is this your verdict?" as the State appears to suggest.

In Apodaca, 940 P.2d at 484, another case cited by the State, the Court of Appeals of New Mexico stressed that "of course, the trial judge is not empowered to refuse arbitrarily to accept a jury verdict." It stressed the importance of unanimity and the "equally important needs for clarity and certainty as to the meaning of the verdict being reported." *Id*. Recognizing the need of the trial judge to resolve ambiguities, the appellate court warned that "the role of the trial judge is to render justice, not to act as an automaton with no more discretion than a voting machine." *Id*.

Apparently, the State would like the trial court to have no discretion to resolve ambiguities. It suggests that trial courts must be limited to one polling question—"is this your verdict?"—despite whatever unique problems may exist; and then, upon any ambiguity, the court must automatically send the jurors back to deliberate without further instruction and without thought to what the jurors may infer from the court's silence.

Here, the court did not use any discretion or even attempt to ferret out the intent of the jurors. Since the goal of polling the jury is to ensure that the intent of the jury is fulfilled, the polling question/s must clarify that intent, not obscure it.

When defense counsel suggested that the jurors had returned a proper verdict but simply did not understand the court's polling question, the court interrupted defense counsel mid-sentence and stated, "No, it either is or is not their verdict... I'm refusing to accept this. Obviously, this is not their verdict" (Tr.1069).[3]

Unlike the trial court's actions in Peters, the court's actions here were not neutral. The trial court did not advise the jurors of the problem with its verdict or direct them how to proceed. Since the court had rejected the life verdicts, two possible verdicts remained--the deadlocked verdict or a death verdict. The form for the deadlocked verdict advised the jurors to return that verdict "if you are unable to decide or agree upon the punishment" (L.F. 266-67). Not understanding the problem with the life verdicts and believing that they could not again return those verdicts, the jury had no choice but to return the deadlocked verdicts.

The State argues that the court did not coerce the deadlocked verdict, because upon polling, each of the jurors agreed with the deadlocked verdicts (Resp.42). But even under that analysis, the court must have coerced the verdict by sending the jurors back to deliberate further without providing any sort of explanation as to why the verdicts were not in proper form. The trial court knew that the jurors were split at 11-1, with George Meyer as the one juror holding out

[3] After he was cut-off in mid-sentence, defense counsel did not request that the jury be polled further. To the extent this portion of the argument is unpreserved, Kenny requests review for plain error. Sup.Ct.R. 30.20.

for life. The court sent the jurors to deliberate further, without advising them to respect each others' opinions and not to agree to a verdict unless each juror personally believed that the State had proven its case. MAI Cr3d 312.10. The Supreme Court has instructed that, where the jury breakdown is eleven to one, "the most extreme care and caution [are] necessary in order that the legal rights of the defendant should be preserved." Packer v. Hill, 277 F.3d 1092, 1105 (9th Cir.2001), *quoting* Burton v. United States, 25 S.Ct. 243, 250 (1905). The trial court took no care to ensure that the one holdout juror would not be coerced to agree to deadlocked verdicts. About fifteen minutes after receiving the new verdict forms, the jury returned the deadlocked verdicts (Tr.1072-73).

The State argues that although the court asked the foreperson to explain what happened in the jury room regarding the life verdicts, it would have been error to question the foreperson further to determine if that first verdict truly was valid (Resp.35). The foreperson gave the following response.

> We misunderstood as far as unanimously agreeing upon a verdict. What we understood was that if we did not agree on one then we would have to vote the other way. But we were not all in agreement of the other verdict so we misunderstood. And we decided with that misunderstanding that we would, because we could not agree on a decision unanimously, that we would give it to the Court.

(Tr.1075-76). The State interprets this response as meaning, "[the jurors] had simply misunderstood the law, thinking that they were always required to sign the verdict for life imprisonment unless they unanimously agreed on the verdict of death" (Resp.36). The answer, however, could also mean that the jurors understood that if they did not agree on one of the steps, they would have to vote for life, that they must have misunderstood because the court rejected the life verdicts, and so, given their lack of understanding, they gave it to the court to decide.

But, truly, the foreperson's "explanation" was clear as mud. It begged for further clarification, especially since the court failed to clarify the intent of the jurors through clear polling questions after they returned the life sentences. What would have been the harm in the court asking the foreperson for further clarification, to ensure that the verdicts truly reflected the intent of the jury, when the jury had come back with life verdicts just fifteen minutes earlier?

In this truly unique situation, the court simply could have asked the foreperson to list the aggravator/s that the jurors found and then asked each juror individually if he or she agreed that the State proved that aggravator. Next, the court would ask the foreperson if each juror had found that the facts in aggravation warranted death. If the foreperson said "no", the inquiry would be ended. If the foreperson said "yes", each juror then would be polled to ascertain his or her agreement. If each agreed, then the court could accept the deadlocked verdict.

Alternatively, the court should have conducted this polling before rejecting the assessment of life sentences. The court should have polled to determine if the jurors found an aggravator. If "yes", then the court should have polled to determine that each juror found that the facts in aggravation warranted the death penalty. That inquiry would have revealed Meyer's dissent and clarified that the assessment of life sentences was proper.

The State implies that Meyer must have engaged in misconduct, as evidenced by the jury's note to the judge that, "We just found out that one of our jurors does not believe in imposing the death penalty" (Tr.1061). But two meanings may stem from the note: (1) that Meyer could never consider the death penalty; or (2) that Meyer did not believe in the death penalty given the facts of this case.

Nothing indicated that Meyer engaged in misconduct. During general voir dire, the State asked if anyone would be unable to follow the law as the court gave it. One juror--not Meyer--responded affirmatively (Tr.82-85). The entire death qualification spanned only 36 pages of the transcript (Tr.156-92). The State asked whether anyone would be unable, realistically, to consider imposing the death penalty (Tr.161, 164). Two venirepersons responded, but Meyer was not one of them (Tr.161-65). The panel answered in the negative when the State asked if there was anyone else who would have trouble signing the verdict form (Tr.166-67), and responded affirmatively that everyone would be able to sign the form (Tr.167).

The State argues that Kenny prevented Meyer from being questioned about his "misconduct" but then wanted to question him after the trial to "impeach" the deadlocked verdicts (Resp.31). But isn't this what the State has done too? The State wanted to question Meyer when it thought he was blocking the sentences the State wanted, but then once the State was happy with the sentences, it attempts to block the defense counsel from seeking the truth from Meyer.

The State argues that it must have been obvious to the jurors that their verdicts were rejected because eleven of the jurors renounced them during the polling (Resp.42). Yes, it was clear that the judge rejected the verdicts based on the apparent lack of unanimity. But the jurors were left to wonder why their lack of unanimity would cause that problem, when the instructions specifically told them that they must return life verdicts if they lacked unanimity on whether the aggravators warranted death. The jurors fell back on the deadlocked verdicts as the only remaining option.

Missouri's capital sentencing statute implicitly contains a presumption in favor of life. It allows a life sentence at any stage of the deliberations. §565.030.4. The jury is never obligated to return a death verdict. The Missouri Legislature intended that even one juror could pull the plug on the death machine if that juror believed that the State had not proven that the aggravators warranted death. §565.030.4(2).

The right to have a jury assess the sentence should be afforded the greatest protection in a capital case. The Missouri Legislature has recognized this also,

since a capital defendant has the right—denied to other defendants—of jury sentencing even when he is a prior offender. §§558.016, 565.030.

This case presents a truly unique problem. We are faced with a situation where (1) the verdict was valid on its face; (2) the verdict can be interpreted as valid under a legitimate reading of the law and instructions; and (3) neither the court nor the State rebutted the presumption of correctness by ascertaining that the verdict clearly was not proper. Yet despite the return of valid verdicts of life imprisonment, Kenny Thompson sits on death row.

This situation could have been avoided very easily, if the court had merely asked several additional polling questions that were tailored to this situation. This situation will rarely, if ever, arise again. But this Court must enable judges to utilize their discretion to avoid or resolve apparent ambiguities in verdicts. In this situation, trial courts must question the jurors as to (1) whether they unanimously found a statutory aggravating factor beyond a reasonable doubt; and (2) whether they unanimously found that the aggravating evidence warranted death. The inquiry is brief and does not invade the province of the jury. It would have completely resolved the problem we now face.

Undoubtedly, there must be heightened reliability in the determination that the death sentence is proper. Woodson v. North Carolina, 96 S.Ct. 2978, 2991 (1976). But the State is satisfied to send Kenny to his death, knowing that at least one juror has given a sworn statement that the jury truly and properly intended to sentence Kenny to life imprisonment. Instead of seeking heightened reliability of

the death sentence, the State seeks diminished reliability and asks this Court to ignore (1) the affidavit of George Meyer; (2) the ambiguity of the court's polling question; and (3) the statutory requirement that life is the proper verdict if the jurors cannot agree that the aggravators warranted death.

This Court must seek an answer to the critical question that it set forth in Peters, 855 S.W.2d at 349--"whether defendant has in fact been acquitted by a jury." Kenny Thompson's fate was determined by his jury, and the jury determined that he should receive two sentences of life without parole. This Court must ensure that Kenny receives the sentences validly returned by the jury.

ARGUMENT II

The trial court abused its discretion in admitting State's Ex.89 as evidence that the Circuit Court of Pettis County had issued an order of protection to Kenny's ex-wife against Kenny. The exhibit was not relevant and the State cannot use the excuse that it acted in good faith in offering the exhibit when its relevance hinged on later questionable testimony, especially since the State affirmatively misled the judge and jury as to the true nature of the Circuit Court's proceedings. Kenny was prejudiced, because the sentencer was improperly led to believe that a court had held a hearing and made a finding that Kenny had committed violence or misconduct against his ex-wife sufficient to warrant an order of protection.

The State completely ignores the main thrust of this issue. The State argues that since it acted in good faith, it could advise the jury that the Circuit Court of Pettis County issued an ex parte order against Kenny in favor of his ex-wife Linda (Resp.49). But the problem is that the State must have known that the "half-information" it gave to the judge and jury was misleading and highly prejudicial. The State read part of the exhibit to the judge and jury, but omitted the rest of the Circuit Court's proceedings--that Linda sought to withdraw the order of protection, the Circuit Court dismissed the cause without a hearing, and costs were assessed against Linda (Tr.727, Ex.89). In its brief, the State fails to justify or even discuss why it misled the judge and jury on these crucial facts.

The State's intentional half-truth negates its argument that it acted in good faith when it offered Exhibit 89 into evidence. The State conceded at trial that Exhibit 89 was only relevant in conjunction with the testimony of Bob Hiller on why he and Linda sought the order of protection (Tr.716). Since the State intentionally misled the court and the jury to believe that the Circuit Court issued a final ruling against Kenny, it cannot be believed now when it states that it acted in good faith in offering the exhibit into evidence.

The State again attempts to circumvent the real issue by arguing that it was defense counsel who kept the jury from hearing the details of the order (Resp.52). Yes, defense counsel objected to inadmissible hearsay testimony of why Linda sought the ex parte order (Tr.715). But the real issue--and what defense counsel argued--is that the jury should not have heard anything about the Circuit Court proceedings unless those proceedings were relevant; the fact that an ex parte order issued, in itself, was not relevant (Tr.715-18, 724). Additionally, the State had a duty of candor to the trial court and a duty to see that justice was done--not to mislead the court and the jury that the Circuit Court had issued a final ruling against Kenny.

The State argues that the exhibit was not prejudicial to Kenny (Resp.50-51). It argues that jurors would not know what an "ex parte order" is and that, if anything, the jury would have assumed that the order stemmed from Kenny's acts against Bob (Resp.50-51). The State insults the intelligence of the jurors by assuming that they would not know what an ex parte order is. With the number of

lawyer and police shows on television and the experiences of the jurors themselves (either as crime victims, or visiting or working in jails, or being on prior juries (Tr.55,70-71,76-77,125-26)), we cannot assume that the jurors would not know that an ex parte order is typically issued in cases of domestic abuse. Since the caption of the case named Linda, the jurors must have concluded that Kenny committed some acts against Linda, not Bob (Ex.89).

If the State felt the exhibit was not prejudicial, then why did it fight so hard to get it admitted? Admission of the ex parte order communicated to the judge and jury that a court had heard evidence and found that Kenny committed some sort of violence or misconduct toward his ex-wife. Since this was the type of conduct alleged against Kenny in this case, yet the ex parte allegation was completely unsubstantiated, the jury and judge were improperly led to believe that Kenny had a proclivity of violence toward women. The resulting death sentences cannot stand.

ARGUMENT III

The trial court abused its discretion in letting the State present testimony through Prine and VanStraten that Arlene Menning moved either during or after the assault, because VanStraten's testimony was merely a subset of Prine's and allowed the State to gain an unfair advantage over the defense by presenting the same testimony and gory photographs twice, causing reversible error.

The State argues that VanStraten's testimony was relevant in that it showed that Mrs. Menning moved her head and arm sometime after the attack began (Resp.57). But the testimony did not show that Mrs. Menning moved her head and arm. In fact, the State itself elicited that VanStraten had absolutely no way of knowing whether the movements were voluntary or involuntary (Tr.639,640; *also* 644,646,647).

The State also justifies VanStraten's testimony in that it corroborated that of Prine and Dr. Dix (Resp.57). In doing so, the State overlooks the problem--VanStraten's testimony was merely a subset of Prine's. The prosecutor herself admitted that VanStraten would provide the same testimony as Prine but just use different words (Tr.221-22). VanStraten offered nothing that was not already before the jury--the aim of his testimony was merely to enable the State to parade the gory photographs before the jury yet once again.

The State contends that Kenny may not rely on this Court's holding in State v. Seever, 733 S.W.2d 438, 411 (Mo.1987), that "the party who can present the same testimony in multiple forms may obtain an undue advantage" or the Eastern District's similar holding in State v. Cole, 867 S.W.2d 685, 686-87 (Mo.App.1993) (Resp.60). The State argues that claims of improper bolstering must be limited to cases dealing with out-of-court statements (Resp.60-61). But that is not what Seever or Cole held.

In Seever, this Court recognized that it was unfair to allow a party to present the testimony of a witness in addition to that witness' entire prior out-of-court statement. 733 S.W.2d at 441. The Court dealt with the issue not as a confrontation claim, but as a general due process claim that it was unfair to allow the same witness to testify twice through differing forms. *Id*.; *see also* Cole, 867 S.W.2d at 686-87 (reversal based on cumulative error of improper bolstering and admission of hearsay statements).

The State argues that Kenny has cited no cases which were reversed due to solely cumulative evidence (Resp.60). But both Seever and Cole were reversed precisely because the State presented the same evidence twice, as was done here.

ARGUMENT VI

The trial court abused its discretion in allowing the State to elicit from Sheriff Spencer, over defense counsel's objection, that Kenny jimmied the locks to get out of the cell. The State's argument creates a new and improper exception to Miranda. The defense did not open the door to the inadmissible testimony, nor was the testimony proper under the "rule of completeness" since the defense did not elicit any part of Kenny's statement to Spencer. The testimony prejudiced Kenny because it supported the State's argument that Kenny was a great risk to escape again if he were sentenced to life imprisonment.

The State advocates the creation of a new exception to the Miranda[4] rule wherein the State may elicit testimony in violation of Miranda so long as the State uses certain magic words. If the State uses the phrase "to your knowledge", it then may elicit statements that were taken in violation of the defendant's Miranda rights.

The prosecutor herself agreed to Kenny's motion to suppress the statement he had given to Sheriff Spencer (1st Tr.819). Based on the parties' agreement, the court sustained the motion (1st Tr.820).

During cross, defense counsel asked Spencer if Kenny committed any violence when he was out of custody (Tr.755). When the State objected that the

question called for speculation, defense counsel re-phrased and asked several additional questions: whether to the best of Spencer's knowledge (1) Kenny committed any violence when he was out; (2) made any efforts to contact Tracey; or (3) committed any violence in escaping (Tr.755).

On re-direct, the State asked Spencer what specific acts Kenny did to commit the escape (Tr.756). After receiving an answer, she asked the same question again (Tr.756). Defense counsel objected on the ground that the State was trying to elicit the excluded statement (Tr.756). Defense counsel suggested that the State show that Spencer had knowledge of Kenny's acts other than from the excluded statement, but the State refused (Tr.757). The court held that defense counsel had opened the door to the excluded statement (Tr.758). The State then asked Spencer to the best of his knowledge what acts Kenny had committed to escape (Tr.758). Spencer revealed that Kenny was the one who jimmied the locks to get out of the cell (Tr.758).

Although this statement had been suppressed as violative of Kenny's Miranda rights, the State justifies its use because the State used the term "to your knowledge" (Resp.78-79). The State completely misconstrues the protections of the Fifth Amendment. If an individual's Miranda rights are violated, "no evidence obtained as a result of interrogation can be used against him." Miranda, 86 S.Ct. at 1630 (emph.added). Once the court held that the statement should be excluded, nothing in that statement could be used against the defendant (1st Tr.820).

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[4] Miranda v. Arizona, 86 S.Ct.1602 (1966).

The State cannot now place the onus on the defendant to show that Spencer's only basis for his knowledge was the statement (Resp.79). The burden would be on the State to show that Spencer had some other basis for knowing that Kenny picked the cell lock, yet the State refused to do so (Tr.757). No evidence suggests that Spencer had this knowledge other than from Kenny's statement.

The State alternatively argues, under the "rule of completeness," that since the defense elicited part of Kenny's statement, the State should be allowed to elicit other parts (Resp.80-81). The problem with this argument is that the defense did not elicit part of Kenny's statement to Spencer. Defense counsel asked Spencer whether, to his knowledge, Kenny used any violence in escaping from the jail (Tr.755). But Spencer was the Benton County Sheriff at the time of the escape from that jail (Tr.750). If any jail employee was hurt during the escape, Spencer would have known about it, independent of Kenny's statement to Spencer. In contrast, though, we know that the testimony elicited by the State was certainly part of the excluded statement (Tr.756-57).

The State downplays its use of the testimony, stating that since it only mentioned it once in closing, it was not a big deal (Resp.77,81-82). But a main theme of the State's case against Kenny was that he was someone who was at great risk to escape again if he received life sentences (Tr.1025-26). The State disparaged the wealth of evidence that Kenny was an ideal inmate at Potosi, by arguing that while he awaited trial, he led five inmates to escape by personally picking the cell locks (Tr.1025-26,1053-55). Because the State intentionally

exploited a statement taken in violation of Kenny's Miranda rights, after agreeing not to, and used that statement as a mainstay of its case against Kenny, this Court must vacate Kenny's death sentences and remand for a new penalty phase.

ARGUMENT VII

The trial court abused its discretion during closing in overruling Kenny's objection to the State's comment that Kenny was merely "building a case" by presenting evidence that he was voted as the laundry worker of the month, and plainly erred in letting the State make comments that set the jury forth as the voice of the victims; misstated the goal of a capital sentencing as solely to obtain justice for the victims; urged the jury to ignore mitigating evidence; and compared the rights of the victims to Kenny's rights at the sentencing trial. Kenny complied with Rule 84.04(d) when he included several claims of closing argument error in one point, because this Court routinely assesses claims of closing argument error in conjunction with each other. Kenny also satisfactorily cited to specific instances of the State's improper closing argument comments. The State improperly personalized by begging the jurors to speak for the victims and thereby abdicate their role as impartial arbiter of the facts and to use emotion rather than reason in assessing Kenny's sentence.

The State alleges that this issue is improperly briefed because it "raises multiple grounds of closing argument error in a single point, Supreme Court Rule 84.03(d)" (Resp.84, fn.8). The State cites Rule 84.03, but must have intended Rule 84.04. At any rate, the Point Relied On substantially complies with Rule 84.04(d), in that it identified the trial court actions that Kenny challenges;

concisely stated the legal reasons for the claim of reversible error; and explained in summary fashion why the legal reasons support the claim (App.39,106).

Furthermore, it made sense to include the several issues together, in that the arguments pervaded the entire closing argument and were intertwined with each other. In addition, this Court typically considers claims of closing argument error in conjunction with each other. *See* State v. Storey, 901 S.W.2d 886, 900-902 (Mo.1995).

The State also faults the brief for allegedly failing "to identify some argument about which Kenny complains, instead citing to seven transcript pages, asking this Court to discover for itself what statements might fit into his category of error" (Resp.84, fn.8). The State takes task with Kenny's statement that the State "argued repeatedly that the goal of the sentencing was solely to obtain justice for the Mennings and should focus on whether the Mennings 'deserve what they got' (Tr.1012, 1013, 1018-19, 1027)" (App.108). Although the initial brief did not set forth the quotations in full, they were obvious from the text. The cited portions are as follows:

> "This case is as much about justice for [Clarence and Arlene Menning] as it ever was about justice for their murderer" (Tr.1012).
>
> "What does this have to do with justice for Clarence and Arlene? Because in the end that is what this is about" (Tr.1013).
>
> "This case is about did Clarence and Arlene deserve what they got. Do not for a second be distracted by that. Because this case isn't about what Tracey did

or didn't do. This is about justice for Clarence and Arlene. And to deny them that is to deny them justice" (1018-19).

"This case is about justice for Arlene and Clarence" (Tr.1027).

The State cites Hall v. State, 16 S.W.3d 582, 585 (Mo.2000), for the proposition that improper personalization only occurs when the State encourages the jury to put themselves in the place of the victim in order to instill fear in the jury. But Hall did not so mandate. Instead, this Court held, "One way in which improper personalization results is when the prosecutor asks the jurors to place themselves or some other identifiable person in the shoes of the victim or at the crime scene." *Id*., *citing* State v. Simmons, 955 S.W.2d 729, 740 (Mo.1997). Hall did not specifically require that the improper personalization place the jurors in fear of the defendant.

By begging the jurors to speak for the victims, the State's argument urged the jury to impose the death sentence based on emotion, not reason, in violation of the United States Supreme Court's mandate in Gardner v. Florida, 97 S.Ct. 1197, 1204 (1977). The argument did not in any way help the jury to make "a reasoned and deliberate decision to impose the death penalty." State v. Taylor, 944 S.W.2d 925, 937 (Mo.1997). The argument is akin to that condemned by this Court in Taylor, wherein the State urged the jury to "get mad" and decide the case based on emotion. *Id*., at 938. By asking the jurors to speak for the victims, the State begged the jurors to abandon their vital role as impartial arbiters of whether Kenny deserved the death penalty. The resulting death sentences cannot stand.

ARGUMENT XII

Kenny's death sentences are disproportionate under §565.035. Upholding the sentences would violate Kenny's rights to due process and to be free from cruel and unusual punishment. U.S.Const., Amends.V,VIII,XIV; Mo.Const., Art.I, §§10, 21. Kenny's sentences were the result of many arbitrary factors and of passion and prejudice. The sentences of death are disproportionate to the penalty imposed in similar cases.

The State must fear that its case for the death penalty is thin, since it reaches outside the evidence or any reasonable inference from the evidence, in arguing that Kenny deserves the death penalty. In particular, the State argues that Kenny (1) confessed that he killed the Mennings so he could rape Tracey (Resp.110); and (2) planned to rape and then kill Tracey (Resp.113).

The State elicited detailed testimony about Kenny's confession, but presented no testimony that Kenny killed the Mennings so he could rape Tracey. Instead, Kenny confessed that he was desperate to speak with Tracey without interference and initially had planned to tie up the Mennings (Tr.411,417-18). When he got to their bedroom, however, he realized that plan would not work, so instead he decided to knock them out (Tr.417,420,702). Kenny confessed that his sole goal in all this was to speak with Tracey (Tr.411,488).

So too, no evidence even remotely suggests that Kenny ever planned to kill Tracey. The State grasps this idea from Kenny's statement that he wanted to have

sex with Tracey "one last time" (Resp.113). But the State's conclusion that Kenny intended to kill Tracey after having sex with her is bizarre.

Kenny wanted to have sex with Tracey "one last time" because he knew she was leaving him (Tr.247,251). He knew she had a new boyfriend (Tr.253,255-56). At the time he had sex with her, he had already killed her mother and stepfather, and he knew that would end any chances of intimacy with Tracey.

The State argues that Kenny "did not kill [Tracey] after he raped her because he thought she 'was not resisting' him raping her" (Resp.113). The State pulls this statement out of thin air--nowhere in the transcript is there any discussion about Kenny's desire to kill Tracey. Kenny never told the police that he planned to kill Tracey; he discussed the sexual encounter and described that at times Tracey resisted and at others she did not (Tr.413-14, 664). But never did he say he spared her life because she did not resist. There is not a shred of evidence that Kenny ever even considered killing Tracey.

Notably, the State never argued this supposed inference throughout any of the penalty phase. It arises for the very first time in this appeal. If the inference really was valid, certainly the State would have argued it to the jury.

Kenny had every chance to kill Tracey and did not. Rather, Kenny struggled to have the chance to speak with her and tried not to hurt her (Tr.411,418). Kenny found slippers for Tracey when she said she had no shoes (Tr.269). When Tracey told Kenny that he was hurting her by carrying her, Kenny put her down immediately (Tr.270). Kenny drove around for a long time speaking

with Tracey (Tr.274,310). Later, he left her at the home of her new boyfriend (Tr.275). Kenny never intended to kill Tracey, nor did he kill the Mennings so he could rape Tracey.

CONCLUSION

Appellant incorporates the Conclusion from page 139 of his Opening Brief.

Respectfully submitted,

_____
ROSEMARY E. PERCIVAL, #45292
ASSISTANT APPELLATE DEFENDER
Office of the State Public Defender
Western Appellate Division
818 Grand Boulevard, Suite 200
Kansas City, Missouri 64106-1910
Tel: (816) 889-7699
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing were delivered to: The Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65102; on the 19th day of April, 2002.

_____
Rosemary E. Percival

Certificate of Compliance

I, Rosemary E. Percival, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 7,635 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

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Rosemary E. Percival, #45292
ASSISTANT PUBLIC DEFENDER
Office of the State Public Defender
Western Appellate Division
818 Grand Boulevard, Suite 200
Kansas City, MO 64106-1910
816/889-7699
Counsel for Appellant